

CIVIL SERVICE COMMISSION MINUTES

February 18, 1998

A regular meeting of the Civil Service Commission was held at 2:30 p.m., in Room 358 at the County Administration Building, 1600 Pacific Highway, San Diego, California.

Present were:

Mary Gwen Brummitt, President
Gordon Austin, Vice President
Roy Dixon
Gloria Valencia-Cothran

Comprising a quorum of the Commission

Larry Cook, Executive Officer
Ralph Shadwell, Deputy County Counsel
Joy Kutzke, Reporting

Commissioner Paul Thomas, absent

CIVIL SERVICE COMMISSION MINUTES
February 18, 1998

1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation

2:30 p.m. OPEN SESSION: Room 358, 1600 Pacific Highway,
San Diego, California 92101

PRE-AGENDA CONFERENCE

<u>Discussion Items</u>	<u>Continued</u>	<u>Referred</u>	<u>Withdrawn</u>
4,5,6,7,8,17,18, 24		20,21	3

COMMENTS Motion by Valencia-Cothran to approve all items not held for discussion; seconded by Dixon. Carried.

CLOSED SESSION AGENDA
County Administration Center, Room 458
(Notice pursuant to Government Code Sec. 54954.2)
Members of the Public may be present at this
location to hear the announcement of the
Closed Session Agenda.

a. Commissioner Austin: Dung Tran, S.E.I.U. Local 2028, on behalf of **Janet Jones** appealing an Order of Suspension from the Sheriff.

b. Commissioner Valencia-Cothran: Deborah Olberding, S.E.I.U., Local 2028, on behalf of **Michael Newman** appealing an Order of Termination from the Department of Social Services.

c. Commissioner Austin: James Gatthey, Esq., on behalf of **Fabian Martinez** requesting a Rule XI investigation regarding failure of probation from the Probation Department.

d. Commissioner Austin: James Gatthey, Esq., on behalf of **Lorna Ramos** appealing an Order of Removal from the Probation Department.

e. Commissioner Austin: James Gatthey, Esq., on behalf of **Rosa Wagner** appealing an Order of Removal from the Probation Department.

REGULAR AGENDA

NOTE: Five total minutes will be allocated for input on Agenda Items unless additional time is requested at the outset and it is approved by the President of the Commission.

MINUTES

1. Approval of the Minutes of the regular meeting of January 21, 1998.

Approved.

CONFIRMATION OF ASSIGNMENTS

2. Commissioner Brummitt as hearing officer in the appeal of **Rosie Ayala** from an Order of Termination from the Sheriff.

Confirmed.

WITHDRAWALS

3. Everett Bobbitt, Esq., on behalf of **William McDaniel** appealing a Reassignment of duties from the Sheriff's Department. Commissioner Brummitt was assigned as hearing officer.

Withdrawn.

DISCIPLINARY FINDINGS

4. Commissioner Austin: Dung Tran, S.E.I.U. Local 2028, on behalf of **Janet Jones** appealing an Order of Suspension from the Sheriff.

FINDINGS AND RECOMMENDATIONS:

Employee was charged with Cause I – inefficiency (engaged in personal phone calls while on duty as an Emergency Dispatcher); and Cause II – acts incompatible with and/or inimical to the public service. Employee did not dispute that she engaged in personal telephone calls while on duty. She alleges that such personal conversations are common and that side-line phone calls related to their duties also cause distractions and dispatchers are adept in handling multiple tasks. This hearing officer concludes that such a defense is not acceptable. Chances of mistakes when dispatchers are handling multiple tasks are higher than when there is focus on a single or few tasks. Employee is guilty of Causes I and II. It is therefore recommended that the Order of Suspension and Charges be affirmed and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

**Motion by Austin to approve Findings and Recommendations;
seconded by Brummitt. Carried.**

5. Commissioner Valencia-Cothran: Deborah Olberding, S.E.I.U., Local 2028, on behalf of **Michael Newman** appealing an Order of Termination from the Department of Social Services.

FINDINGS AND RECOMMENDATIONS:

Employee is charged with Cause I - incompetency (failure to perform duties required of Stock Clerk); Cause II - inefficiency (excessive use of sick leave); Cause III - Insubordination; Cause IV - conduct unbecoming an officer or employee of the County (reacted with agitation and profanity towards supervisor) and Cause V - discourteous treatment of the public or other employees. Employee is found to be unable to perform the essential functions of his job, though he did appear sincere in his desire to perform his tasks well. Employee is guilty of Causes I (with the exception of the second paragraph of Cause I (C)) and II (with the exception of Cause II (A)). Employee is not guilty of Causes I (C) (second paragraph); II (A); III, IV and V. As to Cause I (C) employee was absent on November 7, 1996 and November 11, 1996 - Veterans' Day - County offices were closed). As to Cause II (A), this item was subject to prior discipline and thus cannot constitute a charge in this matter. Insufficient evidence was introduced regarding Causes III, IV and V. Therefore, it is recommended that the Amended final Order of Removal and Charges be affirmed; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Valencia-Cothran to approve Findings and Recommendations; seconded by Dixon. Carried.

6. Commissioner Austin: James Gattey, Esq., on behalf of **Lorna Ramos** appealing an Order of Removal from the Probation Department.

FINDINGS AND RECOMMENDATIONS:

Employee was charged with Cause I -- dishonesty (failure to report the use of pepper spray (OC) in an incident involving a detainee); Cause II - conduct unbecoming an officer of the Probation Department and an employee of the County of San Diego; Cause III - failure of good behavior; Cause IV - acts incompatible with and inimical to public service; and Cause V - insubordination. The preponderance of the evidence indicates that Deputy Wagner sprayed OC at the foot of a detainee's door subsequent to a heated verbal exchange and immediately after closing the door of the detainee's room and attempted to conceal her actions. Deputy Ramos attempted to assist in the concealment by aiding in the search for and/or spraying a disinfectant or deodorant. Employee dishonestly denied her conduct in a subsequent investigation. Employee is guilty of Causes I, II, III, IV and V. Therefore, it is recommended that the Order of Termination be affirmed; and that the proposed Decision shall become effective on the date of approval by the Civil Service Commission.

**Motion by Austin to approve Findings and Recommendations; seconded by Brummitt. Carried.
Dixon - No.**

7. Commissioner Austin: James Gattey, Esq., on behalf of **Rosa Wagner** appealing an Order of Removal from the Probation Department.

FINDINGS AND RECOMMENDATIONS:

Employee is charged with Cause I - conduct unbecoming an officer of the Probation Department (sprayed pepper spray (OC) on the threshold to the door of a detainee at Juvenile Hall); Cause II - dishonesty (denied using pepper spray (OC) in the incident described above); Cause III - insubordination; Cause IV - failure of good behavior; and Cause V - acts incompatible with and inimical to public service. The preponderance of the evidence indicates that Employee sprayed OC at the foot of a detainee's door subsequent to a heated verbal exchange and immediately after closing the door of the detainee's room. Realizing her improper conduct, she attempted to conceal the act by mopping up the spray and searching for and/or spraying a disinfectant or deodorant. Employee dishonestly denied her conduct in a subsequent investigation. Employee is guilty of Causes I, II, III, IV and V. Therefore, it is recommended that the Order of Termination be affirmed; and that the proposed Decision shall become effective on the date of approval by the Civil Service Commission.

**Motion by Austin to approve Findings and Recommendations;
seconded by Brummitt. Carried.
Dixon - No.**

PROCEDURAL INVESTIGATIONS

Complaints

8. James Gattey, Esq., on behalf of **Fabian J. Martinez** request for a Rule XI investigation regarding the manner in which the Probation Department handled Mr. Martinez's dismissal during his probationary period.

This item is continued from the CSC meeting of 1/21/98.

Mr. Gattey pulled this item for discussion. Commissioner Austin introduced Mr. Gattey, on behalf of Mr. Martinez, a former employee in the Probation Department, requesting the Commission to conduct an investigation regarding the circumstances surrounding Mr. Martinez's failure of probation as a Correction Deputy Probation Officer I. Mr. Cook provided his interpretation of Civil Service Rule 4.2.5(c) as it relates to probationary employees dismissed during probationary periods as not having a right to appeal such separations to the Commission. He added that there may be circumstances, in other instances, in which an investigation may be appropriate and which the Commission has a remedy to offer. Mr. Gattey provided the Commission with his views stating there is a distinction of course between an appeal and an investigation. The Commission's duties are to protect the merit basis of the personnel system through investigations and appeal. The fact that a probationary employee does not have the right to an appeal has nothing to do with the right of the Commission to conduct and investigation. The Commission does have jurisdiction and an obligation to conduct an investigation with regard to Mr. Martinez. Further, it has broad authority to issue various orders to departments to take various actions. Tony Albers, Deputy County Counsel, spoke on behalf of the Probation Department. His position is that the basic issue before the Commission is adherence to its own

rules. The Commission has a specific rule regarding this issue, and the law generally states that specific rules take precedence over general rules. In this case, Rule XI is the general investigatory rule protecting the merit basis of the personnel system. Should the Commission determine to conduct a Rule XI investigation concerning Mr. Martinez's probationary dismissal, you will in effect be rejecting Rule 4.2.5. Such an action would set a dangerous precedent by your Commission. The Commission has been judicious in following its own rules and expecting departments to follow its rules. Mr. Albers continued stating that the Commission would be sending a distressing message to departments as to whether it is going to enforce the Rules. Should the Commission wish to conduct a Rule XI investigation regarding probationary employees, it can do so as long as evidence or testimony relating to Mr. Martinez is excluded. Ralph Shadwell, Deputy County Counsel, interjected that court cases treat employees during probationary periods as being similar to at will employees; they can be dismissed without cause at any time during the probationary period. He clarified that the Charter states that probationary employees shall be provided with a statement setting forth the reasons for the dismissal, however, the employee shall have no right of appeal to the Commission. Court cases have recognized that probationary employees cannot be dismissed for a violation of their constitutional rights. Probationary employees do not have property rights to their jobs. Mr. Cook offered another perspective of the rules stating that under certain circumstances the Commission may investigate under Rule XI, even though an issue relates to a specific rule. He gave an example of a situation wherein a complaint is received which is governed by a specific rule; however, the Commission may choose to conduct an investigation under Rule XI to sort things out and either proceed under the specific rule or end as the result of the findings of the investigation. It is a matter of interpretation and discretion as to when the Commission chooses to conduct an investigation. However, in this instance the Commission does not appear to have a remedy to offer Mr. Martinez. The Commission expressed concerns regarding the rules governing the status of probationary employees and discussed possible resolutions to their concerns.

RECOMMENDATION: Deny request.

Motion by Brummitt to deny request for investigation under Rule XI regarding Mr. Martinez; seconded by Austin. Carried. Dixon - No.

SELECTION PROCESS FINDINGS/COMPLAINTS

Findings

9. **Randel C. Orlow** appeal of removal of his name by DHR from the employment list for Correctional Deputy Probation Officer I for failure to meet the employment standards.

10. **Moises Rosado** appeal of removal of his name by DHR from the employment list for Corrections Deputy Sheriff for failure to meet the employment standards.

11. **Dwayne McDougle** appeal of removal of his name by DHR from the employment list for Corrections Deputy Sheriff for failure to meet the employment standards.

12. **Derek Comer** appeal of removal of his name by DHR from the employment list for Corrections Deputy Sheriff for failure to meet the employment standards.

13. **Sherry D. Zullo** appeal of removal of her name by DHR from the employment list for Corrections Deputy Probation Officer I for failure to meet the employment standards.

14. **Nakiya A. Montgomery** appeal of removal of her name by DHR from the employment list for Corrections Deputy Sheriff for failure to meet the employment standards.

15. **David Delong** appeal of removal of his name by DHR from the employment list for Court Service Officer for failure to meet the employment standards.

16. **Albert Sesma** appeal of removal of his name by DHR from the employment list for Corrections Deputy Probation Officer I for failure to meet the employment standards.

RECOMMENDATION: Ratify Item Nos. 9 through 16. Appellants have been successful in the appellate process provided by Civil Service Rule 4.2.2.

Item Nos. 9 through 16 ratified.

Complaints

17. Deborah Olberding, S.E.I.U., Local 2028, on behalf of **Katherine M. Walker**, Investigative Specialist II, appealing the selection process by the District Attorney due to her non-selection for the classifications of Investigative Specialist Supervisor and Investigative Specialist III.

Continued from CSC meeting of 1/21/98.

RECOMMENDATION: Deny request.

Dung Tran, S.E.I.U. Local 2028, addressed Commission regarding allowing Ms. Walker to proceed with a Rule X hearing in order to protect the merit system. He stated that, although Ms. Walker, may not benefit from the outcome of the hearing, it could bring forth violations of the merit system made by the department which may be of benefit in future instances. Ms. Walker is alleging that the Department has circumnavigated the merit basis of the personnel system through reclassification and has promoted other employees who

were not qualified. The Commission discussed the issues presented by Ms. Walker's request and potential remedies should she be successful.

Motion by Dixon to approve staff recommendation to deny request; seconded by Brummitt. Carried.

18. **Katherine M. Silsbee**, former Deputy Public Defender I, requesting a Rule X hearing having been disqualified by DHR to compete as a Deputy Public Defender I.

RECOMMENDATION: Deny request.

Ms. Silsbee addressed Commission regarding her appeal relating to her disqualification for competing in the Deputy Public Defender I selection process. She did not return to work after having been on an authorized leave while previously employed in the Public Defender's office. She stated that she was not aware that her failure to return would be considered a dismissal for cause and is requesting the opportunity to compete for the position. The Public Defender deemed her to have abandoned her position. Mr. Cook cited Civil Service Rule 2.1.6 which provides the authority for DHR to disallow a person to participate in the selection process for any relevant reason, including dismissal for cause. Blair Provo, DHR representative, confirmed that the reason Ms. Silsbee was disqualified to compete, was due to abandoning her former position with the County.

Motion by Dixon to approve staff recommendation; seconded by Valencia-Cothran. Carried.

19. **Tarra Thomas** a Records Clerk in the Probation Department appealing the selection process by the Probation Department for the classification of Deputy Probation Officer I. (See also No. 20.)

RECOMMENDATION: Hold in abeyance pending the outcome of EOMO investigation.

Staff recommendation approved.

DISCRIMINATION COMPLAINTS

20. **Tarra Thomas** a Records Clerk in the Probation Department alleging sexual harassment/discrimination by the Probation Department. (See also No. 19.)

RECOMMENDATION: Assign to a Commissioner and forward to EOMO for investigation and report back to the Commission.

Staff recommendation approved – Commissioner Austin assigned as hearing officer.

21. Willas Demorst, Senior Field Representative, S.E.I.U. Local 535, on behalf of **Larry Barker** alleging sex and age discrimination by the Department of Health and Human Services.

RECOMMENDATION: Assign to a Commissioner and forward to EOMO for investigation and report back to the Commission.

Staff recommendation approved - Commissioner Valencia-Cothran approved as hearing officer.

OTHER MATTERS

Extension of Temporary Appointments

22. General Services

1 Senior Clerk (Rea Velasquez Alvarez)

RECOMMENDATION: Ratify.

Ratified.

23. Ratification of Edward Gallagher, M.D. as an additional name to the list of medical and psychological providers to be used for fitness for duty evaluations at the request of the Department of Human Resources.

RECOMMENDATION: Ratify provider.

Ratified.

24. County Counsel's response to the Commission regarding a request from James Gattey, Esq., at the Commission meeting of January 21, 1998, for interpretation of Civil Service Rule 7.7.2.

RECOMMENDATION: Accept County Counsel's interpretation of Rule 7.7.2 which states in part: ". . .section 7.7.2 does not require a county department to force its employees to attend an interview with a disciplined employee or his or her designated representative prior to the disciplinary hearing and answer questions concerning the acts or omissions upon which the disciplinary action was based".

Mr. Gattey addressed the Commission regarding advice they have received from County Counsel relating to the interpretation of Rule 7.7.2. The rule addresses requirements placed on County departments to make employees available to attend interviews with disciplined employees prior to a disciplinary hearing. He discussed a basic legal principal called legal maxim that he alleges has been ignored. He explained that when an employer creates an employee right, there necessarily follows an employer obligation. He contended that two separate rights are created: (1) a right to inspect documents that may be relevant to a matter where an appeal has been filed, and (2) the right to interview witnesses. He submitted that the obligation is on the Department to tell employees to obey the Commission's Rules. The appointing

authority is explicitly responsible for setting up an interview with witnesses at a time that is convenient to the parties. If the Charter and the Rules grant the right, the employee has to have a remedy. Mr. Gattey expressed the need for the right to examine witnesses prior to a hearing. Mr. Shadwell, counsel to the Commission, responded that there is a right; however, it is not to the extent as expressed by Mr. Gattey. There is a right to interview other employees. There is a need to distinguish between the right to inspect documents in the possession of the appointing authority which is enforceable by the Commission, and the right to interview other employees. The Department may not refuse to make its employees available or prohibit them from giving information during the interview. However, an employee cannot be forced to verbally respond prior to a hearing. He acknowledged that it is beneficial to all concerned parties for the employee to be interviewed; however, a department cannot force an employee to speak with the threat of disciplinary sanctions. He discussed Government Code Section 19574.1 which gives an employee served with an adverse action the right to inspect any documents in the possession of the appointing power which are relevant to such action. The employee or designated representative shall have the right to interview other employees having knowledge of the acts or omissions upon which the adverse action is based. Mr. Shadwell contacted three different offices within the State, all of whom indicated that their interpretation of this statute is consistent with the advice he is providing the Commission. He addressed the issue of the subpoena power of the Commission not extending to the issuance of subpoenas for prehearing conferences. Mr. Austin expressed concerns regarding unfair advantages of departments in terms of preliminary investigations prior to hearings. He addressed concern regarding subtle messages sent by departments when informing employees about the interview process. He expressed the necessity of cooperation of witnesses prior to hearings from an efficiency standpoint. Commissioner Dixon raised concerns regarding departments compelling employees to respond to questions against their will. The Commission discussed various potential remedies, including a rule change. Mr. Cook addressed the Commission stating that it is rare for these types of situations to arise. However, when these situations have occurred in the past, Commission staff has attempted to assist and encourage communication. He stated that prior to the circumstances surrounding the issues in this matter, he has no recollection where such situation was not worked out. Mr. Gattey suggested that the Commission write a letter to department heads saying that Section 7.7.2 gives appellants the right to interview witnesses and the right to relevant documents. Mr. Cook recommended that the Commission accept counsel's advice knowing that the issues may be reconsidered should additional problems arise regarding interviewing witnesses prior to the commencement of a hearing. He further recommended not making a rule or policy change at this time because of the infrequent occurrence of this type of issue. Staff will continue to make contact with respective departments in instances where such an issue arises.

**Motion by Valencia-Cothran to accept County Counsel's letter;
seconded by Brummitt. Carried.
Austin - No.**

25. Public Input.

Dung Tran, S.E.I.U. Local 2028, addressed concerns regarding messages sent to departments as the result of issues discussed at today's meeting. With regard to item No. 24, concerning the interpretation of Rule 7.7.2, he contends that the Commission has sent a message to departments that they can use subtle intimidating tactics to undermine appellants' representatives ability to defend employees. Thus, a distinct, unfair advantage to departments to proceed with discovery is created.

ADJOURNMENT: 5:35 p.m.

NEXT MEETING OF THE CIVIL SERVICE COMMISSION WILL BE APRIL 1, 1998.